# Chern Yen Ming & Anor v Teng Ik Ngee Construction Sdn Bhd & Ors (Chern Boon Hong & Anor, Third Parties)

HIGH COURT (JOHOR BAHRU) — CIVIL SUIT NO 484 OF 1982
ABDUL MALIK ISHAK J
29 OCTOBER 1995

***Civil Procedure*** *— Appeal — Notice of — Limitation of time — When was the notice of appeal 'issued' by the court — Whether delay in issuing notice fatal to proceedings — Whether responsibility of solicitor to ensure court issues notice within time limit — Rules of the High Court 1980 O 56 r 1(3)*

A notice of appeal was filed by the third and fourth defendants against the decision of the senior assistant registrar dismissing the summons for third party directions which was made on 25 November 1992. At the hearing of the appeal on 28 October 1995, counsel for the third parties raised a preliminary objection that the appeal was not properly brought as the notice of appeal was issued by the court on 10 October 1993, which was ten months and ten days outside the five-day time frame allowed by O 56 r 1(3) of the Rules of the High Court 1980 ('the RHC'). Counsel for the third and fourth defendants, on the other hand, argued that they had lodged the appeal within time on 30 November 1992 but the court delayed in issuing the notice, which means that the blame should be with the court. The issues to be decided were: (i) when was the notice of appeal was 'issued' by the court; and (ii) whether the delay in issuing the notice of appeal was fatal.

**Held**, allowing the preliminary objection:

(1) Construing the meaning of the word 'issued' under O 56 r 1(3) of the RHC it would be when the notice of appeal to the judge in chambers was actually signed, sealed and dated. When such notice was signed, sealed and dated then it was deemed to be issued and it was on that date that the court must construe that it was issued (see p 231F; *Boota Singh v Isman bin H Ali* [1957] MLJ 127 followed).

(2) The primary responsibility rests with the solicitors for the third and fourth defendants to ensure that the court issued the notice in Form 114 within five days after the date of the decision appealed against. It was an exercise in futility to put the blame on the court in issuing the notice on 10 October 1993 as the court was totally blameless. It is the legal duty of counsel to observe the strict provisions of O 56 r 1(3) of the RHC. If need be, it is the duty of that solicitors to pursue the matter of issuing the notice within time with the relevant court officer and this is the best way to comply with the stringent requirements of O 56 r 1(3)

of the RHC. Here, the mandatory provisions of O 56 r 1(3) of the RHC had not been complied with and the consequent result would be that the appeal was not properly put before the court (see pp 231G–I, 232B; *Gooi Seng Tuck v Tan Peng Loon & Anor* [1959] MLJ 153 followed).

(3) Where a party who is the subject of a third party notice is able to show that special circumstances exist why third party directions ought not to be given, the court may refuse to give such directions. The effect of a refusal to give directions is to make the third party notice a nullity and to put an end to the third party proceedings. Therefore, by the court's acceding to the preliminary objection raised by counsel for the third parties, the proceedings against the third parties were put to an immediate end (see p 232C–E; *Courtenay-Evans & Anor v Passey & Associates (a firm) & Anor (Greater London Council, Third Party)* [1986] 1 All ER 932 followed).

**[Bahasa Malaysia summary**

Notis rayuan telah difailkan oleh defendan ketiga dan keempat terhadap keputusan yang dibuat oleh penolong kanan pendaftar untuk mengetepikan saman untuk arahan pihak ketiga yang dibuat pada 25 November 1992. Di pembicaraan rayuan pada 28 Oktober 1995, peguam pihak ketiga telah membangkitkan bantahan permulaan bahawa rayuan itu tidak dibawa dengan teratur kerana notis rayuan dikeluarkan oleh mahkamah pada 10 October 1993, iaitu sepuluh bulan dan sepuluh hari di luar tempoh masa lima hari yang dibenarkan oleh A 56 k 1(3) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT itu'). Peguam bagi defendan ketiga dan keempat, sebaliknya, berhujah bahawa mereka telah mengemukakan rayuan dalam masa yang ditentukan iaitu pada 30 November 1992, tetapi mahkamah lambat mengeluarkan notis itu, yang bermakna mahkamah patut disalahkan di sini. Isu-isu untuk diputuskan adalah: (i) bila notis rayuan itu 'dikeluarkan' oleh mahkamah, dan (ii) sama ada kelewatan dalam pengeluaran notis rayuan itu membawa padah.

**Diputuskan**, membenarkan bantahan permulaan itu:

(1) Untuk mentafsirkan makna perkataan 'dikeluarkan' di bawah A 56 k 1(3) KMT itu ia adalah bila notis rayuan ke hakim dalam kamar sebenarnya ditandatangani, dimeterai dan dibubuh tarikh. Apabila notis itu ditandatangani, dimeterai dan dibubuh tarikh ia dianggap telah dikeluarkan dan ia adalah pada tarikh itu yang mahkamah mesti mentafsirkan bahawa ia telah dikeluarkan (lihat ms 231F; *Boota Singh v Isman bin H Ali* [1957] 23 MLJ 127 diikuti).

(2) Tanggungjawab utama terletak pada peguam defendan ketiga dan keempat untuk memastikan mahkamah mengeluarkan notis dalam Borang 114 dalam masa lima hari selepas tarikh keputusan

yang dirayu terhadap itu. Ia adalah gerak kerja yang sia-sia untuk menyalahkan mahkamah dalam mengeluarkan notis pada 10 Oktober 1993 kerana mahkamah tidak bersalah langsung dalam hal ini. Ia adalah tugas peguam di sisi undang-undang untuk mematuhi peruntukan ketat di bawah A 56 k 1(3) KMT itu. Jika diperlukan, adalah tugas peguam untuk menentukan bahawa pengisuan notis dibuat dalam masa yang sepatutnya oleh pegawai mahkamah yang berkaitan dan ini adalah cara yang paling baik untuk mematuhi peruntukan ketat dalam A 56 k 1(3) KMT itu. Di sini, peruntukan mandatori A 56 k 1(3) KMT itu tidak dipatuhi dan kesan langsung dari itu ialah rayuan itu tidak dibawa dengan sempurna di hadapan mahkamah (lihat ms 231G–I, 232B; *Gooi Seng Tuck v Tan Peng Loon & Anor* [1959] MLJ 153 diikut).

(3) Di mana satu pihak yang menjadi perkara notis pihak ketiga boleh menunjukkan bahawa terdapat keadaan yang istimewa mengapa arahan pihak ketiga itu tidak patut diberikan, mahkamah boleh enggan memberikan arahan itu. Kesan dari keengganan itu ialah pembatalan notis itu dan penamatan prosiding pihak ketiga itu. Maka, dengan mahkamah menyetujui bantahan permulaan yang dibangkitkan oleh peguam pihak ketiga, prosiding terhadap pihak ketiga mesti diberhentikan serta-merta (lihat ms 232C–E; *Courtenay-Evans & Anor v Passey & Associates (a firm) & Anor (Greater London Council, Third Party)* [1986] 1 All ER 932 diikut).]

**Notes**

For cases on notice of appeal, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 567–602.

For a case on third party notice, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) para 2496.

**Cases referred to**

*Boota Singh v Isman bin H Ali* [1957] MLJ 127

*Courtenay-Evans & Anor v Passey & Associates (a firm) & Anor (Greater London Council, Third Party)* [1986] 1 All ER 932

*Gooi Seng Tuck v Tan Peng Loon & Anor* [1959] MLJ 153

**Legislation referred to**

Limitation Ordinance 1953

Rules of the High Court 1980 O 6 r 6(3), O 56 r 1(3)

Rules of the Supreme Court 1957 O 14

Rules of the Supreme Court 1965 O 58 r 1(3) [UK]

*Ang Boon Heng* (*HH Long & Co*) for the third and fourth defendants.

*Ho Thian Cheh* (*Ho Thian Cheh & Co*) for the third parties.

**Abdul Malik Ishak J**: On 25 November 1992, the senior assistant registrar heard in chambers the summons for third party directions (encl 112) by the third and fourth defendants for them to serve a statement of their claim on the third parties within 30 days and who shall plead thereto within that period of time. After hearing the submissions of the parties thereto, the senior assistant registrar dismissed encl 112 on the same day with costs. Aggrieved by that decision, the third and fourth defendants filed a notice of appeal to the judge in chambers against the whole decision of the senior assistant registrar that was handed down on 25 November 1992.

Before me on 28 October 1995, Mr Ho Thian Cheh, learned counsel for the third parties, raised a simple and straightforward preliminary objection. It was argued that the appeal was not properly brought before me as it was issued by the court ten months and ten days outside the time frame as allowed by O 56 r 1(3) of the Rules of the High Court 1980 ('the RHC'). Mr Ang Boon Heng, learned counsel for the third and fourth defendants, argued that they had lodged the appeal within time and this was on 30 November 1992, but the court delayed in issuing the notice and, consequently, the blame should be with the court.

Order 56 r 1 of the RHC states that:

(1) An appeal shall lie to a judge in chambers from any judgment, order or decision of the registrar.

(2) The appeal shall be brought by serving on every other party to the proceedings in which the judgment, order or decision was given or made a notice in Form 114 to attend before the judge on a day specified in the notice.

(3) Unless the court otherwise order, the notice must be issued within five days after the judgment, order or decision appealed against was given or made and served not less than two clear days before the day fixed for hearing the appeal.

Since the senior assistant registrar gave his decision on 25 November 1992, the last day for filing the notice of appeal to the judge in chambers would be within five days after that decision and this would be on 30 November 1992. This was complied with by the solicitors for the third and fourth defendants. But the key issue to be decided must surely hinge on the question of when it was issued by the court? At p 6 of the bundle of documents, the date of issue was stated as 10 October 1993, and if calculated from 30 November 1992 the delay would be, as stated above, ten months and ten days. Would that delay be fatal?

It is significant to note that the meaning of the word 'issued' appearing in O 56 r 1(3) of the RHC is of great importance. The Malay version of O 56 r 1(3) of the RHC uses a strong language like 'mestilah dikeluarkan' and for convenience it is reproduced below:

(3) Melainkan jika diperintahkan selainnya oleh mahkamah, notis itu *mestilah dikeluarkan* dalam masa lima hari selepas penghakiman, perintah atau keputusan yang rayuan dibuat terhadapnya itu telah diberi atau dibuat dan disampaikan tidak kurang dari dua hari genap sebelum hari yang ditetapkan untuk pendengaran rayuan itu.

By way of an analogy, Rigby J in *Gooi Seng Tuck v Tan Peng Loon & Anor* [1959] MLJ 153, on the question of an appeal from a decision of the Registrar refusing leave to the appellant to defend proceedings brought against him under O 14 of the Rules of the Supreme Court 1957 and giving the respondent leave to sign final judgment against him on the claim, had this to say at p 154:

> As a matter of practice, however, it is as well that advocates and solicitors should note that the primary responsibility rests with them to ensure that the notice of appeal in such matters should not only be taken out but also be made returnable within the period of five days.

Again, by way of an analogy under O 6 r 6(3) of the RHC, the issue of the writ only comes into being when the registrar assigned a serial number to the writ and of relevance when he signed, sealed and dated the writ. Now, even though the words like 'signed, sealed and dated' do not appear in O 56 r 1(3) of the RHC, yet on perusal of Form 114, I venture to say that in construing the meaning of the word 'issued' the usual salutations of 'signed, sealed and dated' should be attached to it, after all the word 'seal' appears at the bottom portion of Form 114 just above the word 'registrar'. Now, if such salutations apply, the date appearing at p 6 of the bundle of documents, namely, 10 October 1993 reflected a protracted delay of nearly one year after the senior assistant registrar had given his decision.

In *Boota Singh v Isman bin H Ali* [1957] MLJ 127, the question that arose for decision there was whether the Limitation Ordinance 1953 ('the ordinance') ceases to run when the plaintiff requests the court clerk to prepare the summons or whether it continues to run until the summons is actually sealed and issued. It was held by Whyatt CJ that the ordinance continues to run until the summons is actually sealed and when the summons is sealed it is deemed to be issued and the action is then commenced. Applying *Boota Singh*'s case, it can safely be argued that time runs in the present appeal on 25 November 1992 and to construe the meaning of the word 'issued' under O 56 r 1(3) of the RHC it would be when the notice of appeal to the judge in chambers is actually signed, sealed and dated and when such notice is signed, sealed and dated then it is deemed to be issued and it is on that date that the court must construe that it was issued. The primary responsibility rests with the solicitors for the third and fourth defendants to ensure that the court issued the notice in Form 114 within five days after the date of the decision appealed against. It is an exercise in futility to put the blame on the court in issuing the notice on 10 October 1993. The court is totally blameless. It is the legal duty of the solicitors for the third and fourth defendants to observe the strict provisions of O 56 r 1(3) of the RHC. If need be, it is the duty of that solicitors to pursue the matter of issuing the notice within time with the relevant court officer and this must surely be the best way to comply with the stringent requirements of O 56 r 1(3) of the RHC. It is germane to note that the English O 58 r 1(3) of the Rules of the Supreme Court 1965 ('the UK RSC') (*The Supreme Court Practice*) which is in pari materia with our O 56 r 1(3) of the RHC is vividly explained in these terms (see p 833 of *The Supreme Court Practice*):

> The appeal is brought by way of a notice to attend before the judge on a day specified in the notice. If the appeal is to be heard in London, the notice is issued out of the action department of the central office, and it must be issued, unless the time is enlarged, within five days from the decision complained of, and served on the opposite party not less than two days before the day fixed for hearing the appeal. If for any reason the appeal is not or cannot be heard on such date, it may be heard later without extension of time.

For the foregoing reasons, I am impelled to conclude that the mandatory provisions of O 56 r 1(3) of the RHC have not been complied with and the consequent result would be that this appeal is not properly put before me. The upshot of it would be that the appeal to the judge in chambers in encl 116 was dismissed with costs without having to go into the merits of the appeal. As John Newey J said, inter alia, in *Courtenay-Evans & Anor v Passey & Associates (a firm) & Anor (Greater London Council, Third Party)* [1986] 1 All ER 932, where a party who is the subject of a third party notice is able to show that special circumstances exist why third party directions under O 16 r 4 of the UK RSC ought not to be given, eg because of delay in bringing the third party proceedings, the court may refuse to give such directions. The effect of a refusal to give directions is to make the third party notice a nullity and to put an end to the third party proceedings. Here, by acceding to the preliminary objection as raised by Mr Ho Thian Cheh, the third party proceedings against his clients were put to an immediate end.

*Preliminary objection allowed.*

Reported by Hanim Kamaruddin